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MERRILL GORDON

Of Counsel
Richard Bloom
Kenneth Bloom

May 22, 2015

VIA EMAIL ONLY

Via email only to:
senrjones@senate.michigan.gov
sentschuitmaker@senate.michigna.gov
sensbieda@senate.michigan.gov
sentrocca@senate.michigan.gov
senpcolbeck@senate.michigan.gov

Michigan Senate Judiciary Committee Chairman, Senator Rick Jones
Michigan Senate Judiciary Committee Members
Senator Tonya Schuitmaker
Senator Steven Bieda
Senator Tory Rocca
Senator Patrick Colbeck
State Capital
Lansing, MI 48909

Re: Opposition to Senate Bill 351
Senate Judiciary Committee
Committee meeting Tuesday , May 26, 2015 @ 3:00 P.M.

Dear Committee Chairman Jones and Commttee Menmbers Schuitmaker, Bieda, Rocca and Colbeck:

I write the committee in opposition to Senate Bill 351. As part of my practice, I often contact defendants within this 21 day period and many of those I contact, whether or not becoming a client of mine, thank me for providing them notice and allowing them to prepare for divorce proceedings in an orderly and thoughtful manner.

This criminal bill seeks to impose a 21 day waiting period, from the date a summons is

issued for direct solicitation of divorce clients by attorneys. The stated reason for such legislation, proponents state, is to avoid possible spousal abuse. In reality, if an abuser learns of divorce proceedings by a letter or by being served with a Summons and Complaint, his action will likely not change. An abuse victim needs to take protective action from the outset. This proposed legislation is not been demonstrated as warranted, is an unconstitutional incursion on commercial free speech, and has been previously proposed before the Supreme Court and not

implemented, Chief Justice Young stating in his April 5, 2012 letter to the State Bar of Michigan, that the proponents of the proposal failed to present any empirical evidence to support that proposal (in substance much the same as S.B. 981, now S.B. 351) Chief Justice Young stated:

> *To protect against potential [constitutional] challenges that might be raised if the Court adopts the proposed amendment, the Court invites the bar [State Bar of Michigan] to conduct a study to gather empirical evidence to support the proposed amendment. (see attached April 5, 2012 letter from Chief Justice Young to Janet Welch Executive Director of the State Bar of Michigan)*

The State Bar never conducted such a study and again failed to present any empirical evidence.

This proposed legislation should not be passed out of committee nor adopted for the following reasons:

1. S.B. 351 is an unnecessary and unwarranted intrusion on protected commercial free speech (proponents can only point to anecdotal stories).
2. S.B. 351 has not been demonstrated necessary by any empirical evidence, finding or study.
3. S.B. 351 is likely unconstitutional.
4. S.B. 351 invites significant and costly court challenges.
5. The proponents of S.B. 351 were unable to demonstrate the need for this intrusion on legitimate commercial free speech to the Supreme Court and without any further evidence or justification seek to have S.B. 351 passed as law.
6. That the "wrong" seeking to be corrected will be ineffective as any potential abuser will receive notice when served regardless.
7. That Michigan Court Rule 8.119(F), which is already in place and available remedies this perceived problem by allowing the sealing of records by the assigned judge.

8. Other than in the area of personal injury, I am unaware of any other state imposing such restriction.

In support of my opposition to S.B. 351, I have attached the following for your further consideration:

1. Chief Justice Young's April 5, 2012 letter to Janet Welch Executive Director of the State Bar of Michigan, in which the Supreme Court declines to adopt a like measure in 2012 finding it not supported by empirical evidence and likely unconstitutional.
2. My previous letter to the Supreme Court of February 27, 2012 and my cover letter to the Senate Judiciary Committee dated September 12, 2014.
3. A letter of September 13, 2014 from Attorney John Allen, setting out in detail the likely constitutional short falls of S.B. 981of last session and further arguments against adoption of S.B. 981 which is substantially the same as S.B. 351.
4. Senate Bill 351 (for reference).

It is my belief that this matter should not be considered by the committee and if considered rejected by this committee.

Should this committee hearing go forward, I look forward to testifying in opposition.

Should any member wish to discuss this matter with me or should you wish me to provide any additional information, please feel free to contact me.

Very truly yours,

Merrill Gordon

MG/mmh

cc: Senate Judiciary Committee
Nick Plescia (nplescia@senate.michigan.gov) Senatebill351.01.doc

Michigan Supreme Court

ROBERT P. YOUNG, JR.
CHIEF JUSTICE

MICHIGAN HALL OF JUSTICE
925 WEST OTTAWA STREET
LANSING, MICHIGAN 48913
313-972-3250

April 5, 2012

Janet K. Welch
Executive Director
State Bar of Michigan
306 Townsend Street
Michael Franck Building
Lansing, MI 48933-2012

RE: ADM File No. 2010-22

Dear Janet:

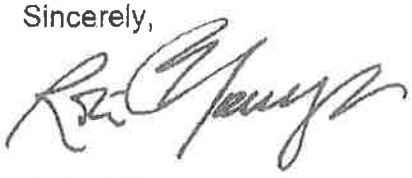
After the administrative public hearing held March 28, 2012, the Supreme Court considered the proposal that was submitted by the State Bar of Michigan's Representative Assembly in Administrative File No. 2010-22. As you are aware, the United States Supreme Court has held that although attorneys have a right to send truthful and nondeceptive communications to potential clients (under *Shapero v Ky Bar Ass'n*, 486 US 466 [1988]), a state may restrict that right under *Florida v Went For It*, 515 US 618 (1995), if the regulation meets the three-part test outlined in *Central Hudson Gas & Elec Corp v Public Serv Comm of NY*, 447 US 557 (1988). The Supreme Court's description of the test in *Went for It* states:

> First, the government must assert a substantial interest in support of its regulation; second the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be narrowly drawn.

In applying this test, the United States Supreme Court discussed the second prong at length. In *Went for It*, the Court held that the findings of an extensive study conducted by the Florida state bar, which included both statistical and anecdotal data, were sufficient to satisfy the second prong of the *Central Hudson* test. The Court distinguished the facts in *Went for It* from the facts of another solicitation case (*Edenfield v Fane*, 507 US 761 [1993]), in which no evidence had been offered in support of the regulation, and which was struck down by the Supreme Court for that reason. The Court in *Went for It* (quoting *Edenfield*), explained that meeting the second prong "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."

During the Court's discussion relating to the bar's proposed amendment in this file, there was significant concern that adoption of the proposed amendment without a basis of support shown in more empirical terms may violate the second prong of the *Central Hudson* test. Members of the bar who submitted comments and spoke in support of the proposed amendment provided anecdotal references, but United States Supreme Court opinions do not clearly define the type and amount of evidence that would be sufficient to uphold the sort of regulation on commercial speech that is contained in the proposed amendment. To protect against potential challenges that might be raised if the Court adopted the proposed amendment, the Court invites the bar to conduct a study to gather empirical evidence in support of the proposed amendment. Upon completion of such a study, the Court will be happy to consider adoption of the proposed amendment.

Sincerely,



Robert P. Young, Jr.

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MERRILL GORDON

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September 12, 2014

Via email only to:
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sensbieda@senate.michigan.gov
sentrocca@senate.michigan.gov

Michigan Senate Judiciary Committee Chairman, Senator Rick Jones
Michigan Senate Judiciary Committee Members:
Senator Tonya Schuitmaker
Senator Steven Bieda
Senator Tory Rocca
State Capital
Lansing, MI 48909

Re: Senate Bill 981
Senate Judiciary hearing date: September 16, 2014 @ 2:30 P.M.

Dear Chairman Jones and Committee Members Schuitmaker, Bieda and Rocca:

I write this letter with attachments in opposition to S.B. 981 and request an opportunity to be heard before the committee.

There was a previous attempt to adopt the substance of this bill in 2012. In 2012 the Michigan Supreme Court considered a proposal with a less restrictive 14 day waiting period. This was ADM 2010-22 seeking to amend Michigan Rule of Professional Conduct 7.3. Public hearing was held before the Michigan Supreme Court on March 28, 2012, at which time this matter was considered. (Please see attached Michigan Supreme Court Release and Notice of Public Administrative Hearing regarding this matter).

I testified at this hearing in opposition to that proposal and submitted the attached letter dated February 27, 2012 in opposition to the proposed amendment. By attachment hereto, I incorporate that letter to this letter and ask that you consider both regarding this matter and that these letters with attachments be made part of the public record.

After comment period and public hearing the Supreme Court determined not to adopt this proposal as an amendment to the Michigan Rule of Professional Conduct 7.3 and the matter was administratively closed by the Supreme Court on June 6, 2012.

It is my belief that there was not then nor is there now a proper or sufficient basis for the imposition of the restrictions contained in Senate Bill 981.

For the reasons set forth in this letter and those contained in my attached letter of February 27, 2012, I urge this committee to vote against this bill and not pass this bill out of committee.

Very truly yours,

Merrill Gordon

MG/mmh

Enclosure

cc: Ms. Sandra McCormick, smccormick@senate.michigan.gov
Ms. Renee Edmondson, redmondson@house.mi.gov

Misc.091214.MISenate

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MERRILL GORDON

Of Counsel
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February 27, 2012

VIA U.S. MAIL AND
EMAIL MSC clerk@courts.mi.gov

Mr. Corbin R. Davis
Clerk Michigan Supreme Court
P O Box 30052
Lansing, MI 48909

Re: ADM 2010-22 and MRPC7.3

Dear Mr. Davis:

This letter is to advise the Court of my position in opposing the adoption of ADM 2010-22. Although I had been sending letters to prospective clients, based on filings in Circuit Court, and am aware of the proposed rule indicating that there should be a fourteen day waiting period before this type of letter could be sent, I believe that this waiting period is over broad and not warranted. Advising potential clients of the existence of litigation, is a service to these litigants. Further, I am offended at the characterization of this as "Trolling" and the rule being labeled an "anti-trolling" proposal by those in support of this proposal. This proposal seeks to artificially limit information that is a matter of public record. If the sealing of records is necessary, the Plaintiff should seek ex-parte relief to do so. The filing party should not be given an advantage by limiting a responding parties' access to information or representation. Any actions that a Plaintiff could take within 14 days after filing, such Plaintiff could take prior to filing. Thus obviating the need for a fourteen day waiting period, or any waiting period for that matter.

I received phone calls from many individuals to whom I have sent correspondence who have indicated to me that they were thankful that they were made aware that litigation was pending so that they could timely prepare for this litigation and hire counsel, myself or other counsel, to represent them in this matter without waiting an extended period of time, thus avoiding having their spouse or the opposing party gaining an advantage. If this proposal is

adopted, Plaintiffs would have the same advantage this proposal seeks to control responding parties from having.

It seems to me that setting an artificial limit on the ability of a responding party to seek counsel and/or counsel seeking to help those responding parties by offering representation, is unfair and unwarranted. There is no limit to the extent of preparation a Plaintiff has in determining to move forward with divorce litigation, if this proposal is enacted, Defendant's would be severely disadvantaged in their ability to respond and be properly represented.

I bring to the Court's attention, my representation of an, active duty military service member and a resident of Hawaii, who was sued for divorce in the Oakland County Circuit Court. He was served on December 26, 2011, in Michigan while on leave, after filing was made on December 22, 2011, by his wife who had their child here in Michigan. He became a client of mine after I had sent him a letter concerning representation immediately after his wife had filed her Complaint. He had previously instituted divorce proceedings in Hawaii on December 16, 2011. His wife had not yet been served and was avoiding service. If he had not received my letter indicated above and been unaware of counsel to represent him he would have been prejudiced by his return to Hawaii without seeking counsel to respond to his wife's "Emergency Motion", concerning his daughter. Being properly represented by the undersigned resulted in the Oakland County Circuit Court declining jurisdiction in favor of the Court in Hawaii. This is but one of many instances where early representation has resulted in a level playing field for both litigating parties.

To the extent that prior violence is deemed to be an issue to be considered as is noted in the staff comments, surely minor restrictions as to the "solicitation" could be imposed such as a preclusion of "solicitation" of an individual when there is a Personal Protection Order filed. To the extent that Plaintiffs' attorneys need to properly arrange affairs of their clients at the outset of litigation, this should be completed prior to the filing of the Complaint. In reality, what is the difference in a Defendant's first knowledge being served with a Summons and Complaint by a process server or receiving a "solicitation" letter? There seems to be no difference affecting a Defendant's propensity for violence.

There is no limitation on broader market advertising, nor should there be. This restriction on solicitation unfairly limits the sole or small practitioner and others from seeking to timely advise potential clients of available services and puts Defendants at a disadvantage. In my opinion it is an unnecessary restraint. Proponents may cite limited circumstances, which are problematic for the filing spouse, but such anecdotal and infrequent circumstances should not dictate wholesale restrictions on such direct contact. On the whole, it has been my experience that individuals who receive information from me that litigation is pending are pleased that they have adequate timely information about the filing of the initial pleadings and timely information concerning representation.

Should you wish me to provide additional information regarding this matter, I would be happy to do so.

Very truly yours,

Merrill Gordon

MG/mmh

MICHIGAN SUPREME COURT

Office of Public Information

contact: Marcia McBrien | (517) 373-0129

FOR IMMEDIATE RELEASE

PROPOSED JUDICIAL CONDUCT RULES CHANGES ON AGENDA FOR MICHIGAN SUPREME COURT MARCH 28 PUBLIC ADMINISTRATIVE HEARING
Proposal specifies appropriate roles for judges at charity fundraisers and similar events

LANSING, MI, March 27, 2012 – A proposed clarification of ethics rules that prevent judges from soliciting donations for charities and similar organizations is on the agenda for the Michigan Supreme Court's public hearing tomorrow.

Canon 5 of the Code of Judicial Conduct allows judges to participate in "civic and charitable activities" that do not put a judge's impartiality in doubt or interfere with the judge's duties. But, while allowing a judge to "join a general appeal on behalf of an educational, religious, charitable, or fraternal organization," ethics rules bar judges from individually soliciting donations for such groups. The proposed changes would clarify that "[a] judge may speak on behalf of such an organization and may speak at or receive an award or other recognition in connection with an event of such an organization." The proposals would allow a judge to participate in the same ways at a law-related organization's fundraiser. But the amendments would also prohibit a judge from allowing his or her name to be used in fundraiser advertising, unless the judge was simply a member of an honorary committee or participating in a general appeal. **(ADM File No. 2005-11).**

The proposals for all public hearing items and their related comments are available online at http://www.courts.michigan.gov/supremecourt/Resources/Administrative/index.htm#proposed.

The public hearing, which begins at 9:30 a.m., will take place in the Supreme Court courtroom on the sixth floor of the Michigan Hall of Justice in Lansing.

Also on the Supreme Court's agenda:

- **ADM File No. 2010-22**, proposed amendment of Michigan Rule of Professional Conduct 7.3, "Direct Contact with Prospective Clients." The rule prevents attorneys from soliciting "professional employment from a prospective client with whom the lawyer has no family or prior professional relationship …" The proposed amendment would add that, in family law cases, "a lawyer shall not initiate contact or solicit a party to establish a client-lawyer relationship until the initiating documents have been served upon that party or 14 days have passed since the document was filed, whichever action occurs first." The State Bar of Michigan's Representative Assembly suggested the service/14-day restriction to reduce the risk that a defendant in a family law case would assault the other partner, abscond with children, or commit "other illegal actions" before the papers can be served.

MICHIGAN SUPREME COURT

NOTICE OF PUBLIC ADMINISTRATIVE HEARING

Pursuant to Administrative Order No. 1997-11, the Michigan Supreme Court will hold a public administrative hearing on Wednesday, March 28, 2012, in the Supreme Court courtroom located on the sixth floor of the Michigan Hall of Justice, 925 W. Ottawa Street, Lansing, Michigan 48915. The hearing will begin promptly at 9:30 a.m. and adjourn no later than 11:30 a.m. Persons who wish to address the Court regarding matters on the agenda will be allotted three minutes each to present their views, after which the speakers may be questioned by the Justices. To reserve a place on the agenda, please notify the Office of the Clerk of the Court in writing at P.O. Box 30052, Lansing, Michigan 48909, or by e-mail at MSC_clerk@courts.mi.gov, no later than Monday, March 26, 2012.

Administrative matters on the agenda for this hearing are:

1. 2005-11 Proposed Alternative Amendments of the Code of Judicial Conduct.
Published at 490 Mich 1208 (Part 3, 2011).
Issue: *Whether to adopt one of the proposed alternatives of various Canons of the Code of Judicial Conduct, or take other action. Alternative A would combine Canons 4 and 5 so that obligations imposed regarding extrajudicial activities would be the same for law- and nonlaw-related activities. Alternative B would loosely model the ABA Model Code of Judicial Conduct, but the ABA's 15 model rules would be combined within Michigan's current two Canons 4 and 5 and would retain nearly all current language of Canons 4 and 5. Both alternatives would eliminate language in Canon 7 that prohibits judges from accepting testimonials and would clarify Canon 2 so that activities allowed in Canons 4 and 5 would not be considered a violation of "prestige of office." Also both proposals would clarify the scope of activities within which a judge may participate (especially when the activities would serve a fundraising purpose).*

2. 2010-22 Proposed Amendment of Rule 7.3 of the Michigan Rules of Professional Conduct.
Published at 490 Mich 1219 (Part 3, 2011).
Issue: *Whether to adopt the proposed amendment of MRPC 7.3 that would limit the ability of an attorney to contact or solicit a defendant in a family-law case for 14 days after the suit is filed, or until the defendant is served (whichever occurs first).*

3. 2010-25 Proposed Amendment of Rule 7.210 of the Michigan Court Rules.
Published at 490 Mich 1205-1206 (Part 2, 2011).
Issue: *Whether to adopt the proposed amendment of MCR 7.210 that would require trial courts to become the depository for exhibits offered in evidence (whether the exhibits are admitted, or not) instead of requiring parties to submit those exhibits when a case is submitted to the Court of Appeals.*

4. 2010-26 Proposed Amendment of Rule 7.210 and Rule 7.212 of the Michigan Court Rules.
Published at 490 Mich 1206-1208 (Part 2, 2011).
Issue: *Whether to adopt the proposed amendments of MCR 7.210 and MCR 7.212 that would extend the time period in which parties may request that a court settle a record for which a transcript is not available and would clarify the procedure for doing so.*

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September 13, 2014

sentschuitmaker@senate.michigan.gov

Senator Tonya Schuitmaker
P.O. Box 30036
Lansing, MI 48909-7536

Re: **Senate Bill 981 Should be Rejected; Hearing September 16, 2014; IMMEDIATE Action Required.**

Dear Tonya:

Thank you for taking time to speak with me about this important issue. Senate Bill 981 is a bad idea, tucked into a package of bills most of which are very good ideas. Not only is SB 981 likely unconstitutional, but also it holds the prospect of harming the very persons it seeks to protect. It requires some detailed examination to see this, and why Senate Bill 981 should be rejected. In this very busy season, I appreciate your taking the time to do that.

It is my understanding that SB 981 is part of a package of Domestic Violence Bills that includes SB 980 and 981, and House Bills 5652-5659. The hearing on Senate Bill 981 is set for hearing before the Senate Judiciary Committee next Tuesday September 16, 2014 at 2:30 PM. Prompt action is required to avoid what will likely be a very bad law.

As you know, I am a partner with Varnum Riddering Schmidt & Howlett LLP (Varnum Attorneys), with over 40 years of experience in Michigan Family Law. In the past, I have also served as Chair of the State Bar of Michigan Special Committee on Grievance, and have served as the Chair of the State Bar of Michigan Standing Committee on Professional and Judicial Ethics (the "Ethics Committee").

I also served on the ABA Ethics 2000 Advisory Committee, and chaired the Ethics and Professionalism Committee of the ABA, Trial Tort and Insurance Practice Section (TIPS) through the ABA Ethics 2000 process. Currently, I serve as the TIPS Liaison to the ABA Committee on Professionalism. In all these capacities, I have had the honor of studying in depth the issues of lawyer solicitation in SB 981.

This letter contains the views of me only, not those of the Varnum Firm, the State Bar of Michigan, the ABA, nor their Committees.

Earlier Versions before the Michigan Supreme Court

Earlier, the Michigan Supreme Court rejected other versions of a very similar proposal, when proposed as amendments to the Michigan Rules of Professional Conduct (MRPC-, sometimes called the "Ethics Rules" for Michigan Lawyers). In 2012, the Court considered proposed amendments to MRPC 7.3 (Supreme Court ADM File No. 2010-22). Much like SB 981, ADM 2010-22 originated from the State Bar of Michigan Family Law Section, in a concern over the practice of "trolling" (that is, a lawyer's using the publicly available information of Family Law court commencement filings to solicit Defendants or Respondents as prospective clients). Most of the submitted Comment Letters supported the proposal, as did a committed group of individuals. In contrast, a smaller but vocal group (including me) opposed the amendment.

After months of careful consideration, the Court rejected the proposal. Among the likely reasons were that the proposal (like SB 981) infringed important Constitutional rights of both respondents and lawyers, and that ample protections already exist within the Michigan Court Rules to accomplish the stated goals. Like SB 981, the MRPC proposal also had very likely, and very bad, unintended consequences. This letter explains more fully those reasons.

1. **It is a dangerous custom to single out one area of law practice (i.e., Family Law) for specific prohibitions under the criminal law.** SB 981 would impose strict criminal liability (First Offense- Misdemeanor- $30,000 fine; Subsequent Offenses- Misdemeanor- 1 year in jail, plus $60,000 fine). The criminal law is a strict liability, penal system. It does not rely on "fault" or "causation" to determine strict culpability; other facts such as care in the past or lack of earlier violations does not enter that finding. If you did it, it is a violation -- it is just that simple.

Moreover, any such criminal violation would certainly result in Disciplinary Proceedings against the lawyer by the Attorney Grievance Commission (AGC) before the Attorney Discipline Board (ADB). Thus, even if some violation were the result of negligence or with lack of direct intent or knowledge, nevertheless, some discipline (ranging from Informal Reprimand to full Revocation of License—see MCR 9.106) must almost always be imposed. This is why attempting to regulate the Practice of Law by the Criminal Law is such a bad idea. The real penalty is not "just" the loss the financial fine, nor even "just" the jail term. It is the loss of a career and the other jobs created by that career. Any proposed criminal penalty, to regulate what is now accepted and legal conduct, must be taken with the utmost seriousness. Momentary political popularity should not be a criterion.

It is also a bad idea to single out one area of Law Practice for statutory regulation, or criminal penalties. If SB 981 becomes law, Family Law practitioners might likely be singled out for other such criminal prohibitions or rules in the future, applicable only to Family Law matters. If "trolling" is really that bad, then the prohibitions should apply to **all** lawyers in **all** cases—something which would not likely ever be approved, and certainly would be unconstitutional. [In fact, an earlier broader proposal to amend MRPC to limit solicitation more generally was once adopted by the Michigan Supreme Court, then quickly rescinded because of protests by many clients and lawyers, and threats of constitutional challenges. Eventually that proposal was unanimously rejected and withdrawn from Supreme Court consideration. See Supreme Court ADM 2002-24.]

2. There are serious Constitutional Defects in SB 981, under Prong 2 of the *Central Hudson* Test. Like it or not, attorney solicitation is **protected commercial speech** under the U.S. Constitution, Amendment I, and correlative provisions of the several State Constitutions, including Michigan. *Central Hudson v. PSC*, 447 U.S. 557 (1980). In the comments for ADM 2010-22, the State Bar of Michigan Family Law Section correctly noted the applicability of *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), and *Shapero v. Kentucky Bar Assn.*, 486 U.S. 466 (1988) as controlling U.S. Supreme Court Cases, all of which determine whether the restriction or prohibition upon lawyer solicitation is constitutionally permissible by applying the ***Central Hudson* 4-Prong test**:

1) The government must have a substantial/ compelling interest to justify the restriction, such as protecting the clients or wronged businesses (protecting the legal profession will likely not suffice);

2) The government regulation must further the identified substantial/ compelling interest;

3) The regulation must be a reasonable fit, not too broad in its results.

4) The regulation must be the "least restrictive means" of accomplishing the above objectives.

First, under **Prong 2 of *Central Hudson*, the "substantial interest"** must be empirically proven with admissible evidence (competent like any other expert evidence or survey under *Davis v Frye or Daubert*). A collection (even a large collection) of anecdotal stories from Family Law attorneys does **not** provide that evidence to constitutional satisfaction. The law requires more. In *Went-For-It* (cited and adopted by the Family Law Section before the Michigan Supreme Court), the Florida Bar spent over $200,000 conducting a scientifically sound survey and interview procedure to prove mass tort personal injury plaintiffs were harmed by early solicitation.

In rejecting ADM 2010-22, the Michigan Supreme Court suggested that the proponents develop like evidence. The State Bar of Michigan decided not to do that. Nothing like that appears before the legislature as part of the background of SB 981. This makes any resulting statute vulnerable to attack by anyone charged with its violation. And trust me, it will be challenged. These are lawyers you are dealing with. Such vulnerabilities also could make the Attorney Grievance Commission and Attorney Discipline Board more reluctant to pursue even convictions as violations of the MRPC.

3. Contrary to its proponents, SB 981 also has issues under the 4th Prong of *Central Hudson*, which requires that the solicitation speech restriction be the "least restrictive" measure which is effective to accomplish the stated purpose. SB 981 apply to ALL family law matters, whether or not the matter presented the concerns expressed for preventing domestic violence or dissipation of assets. Moreover, the same result could be obtained simply by scaling

the file (or even **all** Family Law files[1]) until expiration of 14 days or service of process, whichever is earlier. The court has the power to do this in any case. See MCR 8.119(F)—which does require a Motion and a small additional burden on both the filing party and the court—but would have a better chance to obtain the protection desired by SB 981, and be much "less restrictive" under *Central Hudson*. Sealing such files, and **only** those files which present issues of domestic violence concern, is a much "less restrictive" means of obtaining the desired result. It also provides an opportunity for the judge (locally located with "boots on the ground") to review whether the specific case actually presents those concerns. After all, without such a sealing order, even under SB 981, the commencement of the action is still public information and easily available to any Defendant, all the more so with the advent and increase of electronic filing and internet – based information systems.

Thus, in *toto*, the Amendment fails two prongs of the *Central Hudson* tests, and is unlikely to survive a constitutional challenge.

4. The proposed Amendment will hurt those it seeks to help, because it assumes that it is always the Non-filing Party who is the evil doer. "Intentionally contact" and "directly solicit" are not well defined, and SB 981 will certainly go beyond classic "trolling" practices (e.g., who "initiated" the conversation at the social event? Is responding to that social event conversation "solicitation" if client engagement is the object? Is it "solicitation", even if the person is a "former client"? A "present client"?). If a lawyer sees a court filing adverse to a former or present client, the lawyer may likely have a duty to contact and inform them. Is that now to be a crime? These questions present substantial issues regarding "overbreadth" under the First Amendment.

With such questions not answered in SB 981, allegations of "wrongful solicitation" might become more common, if only to disqualify Defendant's chosen and preferred counsel (much the way bogus "conflict" claims have become more common for the same purpose). If adopted, the new "Rule" might deter a Michigan Attorney from engaging in any Family Law matter (even on behalf of a victim of domestic violence who was **not** the "first to file") until after the proof of

[1] Sealing all Family Law Matters is a worthy consideration. With the advent of electronic filing and internet access to public court files, every 9- year old with an iPad can read the file of their parents' divorce, and the file of the divorce of all of their friends. This is not good. But, like SB 981, such regulation of court administration is better left to the Michigan Supreme Court, not the legislature.

service is filed, just to be safe and simply to avoid any chance of a violation of this ambiguous criminal statute.

An aggressive and abusive Plaintiff, bent on domestic violence or dissipation of assets, could purposely be the "first to file" and then become the "protected" party, with a "free ride" period (until the filing party decides to file the Proof of Service).[2] Also, SB 981 prohibits solicitation contact until after the "Proof of Service" is filed. But it is the filing party who controls that, and could purposely delay that event for 90 days. See MCR 2.102(D). This would allow the filing party to do his or her evil for three (3) months(!), while the non-filing party would face an impossible task attempting to obtain legal advice or representation. If enacted, SB 981 could become a very formidable tool for the abuser. That makes no sense.

Such "unintended consequences" commonly occur when the legislature attempts to use the criminal law to regulate what is properly a matter for the Michigan Supreme Court and the more specific constitutional power of the judicial branch to regulate courts and lawyers. Regulation of lawyer solicitation should be done, if at all, through the MRPC, and is best when it occurs with the support of similar adoptions in other States, or with the endorsement which comes from provisions having been placed into the Model Rules of Professional Conduct by the American Bar Association. This Amendment has neither of those *bona fides*, and would put Michigan in further departure from the ABA Model Rules and laws adopted by other States.

5. When we think our only tool is a hammer, we tend to view every issue as a nail. The Criminal Law is not the solution to every problem and issue presented. Domestic Violence is a serious issue, with a deserved high public profile. It would not be wise to use limited resources to fight a losing battle over an unconstitutional statute, which will only end up being used by abusers to inflict further abuse on the very victims the legislature is attempting to protect.

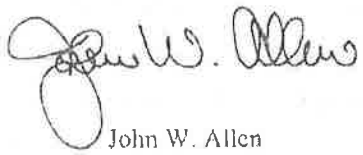
Other already available tools, such as a Sealing Order under MCR 8.119(f), should be used first, to determine if that method gives the desired protection to those who need it, without amending the Criminal or other laws. Maybe ALL Family Law files should be sealed. But those determinations, if made at all, should be supported by valid, admissible evidence, and constitutional validity under *Central Hudson*. This would be a more thoughtful approach, and

[2] During my 42 years' experience as a Michigan Family Law lawyer, it is common for the aggressive, abusive party if the "first filer" Plaintiff. Given their more aggressive, more controlling and more plotting nature, this is not a surprise.

would protect not only the rights of all parties and the commercial speech of all lawyers from further intrusions, but also the interests of those Family Law Defendants and victims of domestic violence who truly need and desire it.

As always, thank you for your kind consideration.

God Bless America,



John W. Allen

JWA/jwa

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SENATE BILL No. 351

May 21, 2015, Introduced by Senators JONES, BRANDENBURG, HERTEL, NOFS, MARLEAU and HORN and referred to the Committee on Judiciary.

A bill to amend 1961 PA 236, entitled

"Revised judicature act of 1961,"

(MCL 600.101 to 600.9947) by adding section 914.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

SEC. 914. (1) A PERSON SHALL NOT INTENTIONALLY CONTACT AN INDIVIDUAL WHOM THE PERSON KNOWS TO BE A PARTY TO A DIVORCE ACTION FILED WITH A COURT, OR AN IMMEDIATE FAMILY MEMBER OF THAT INDIVIDUAL, WITH A DIRECT SOLICITATION TO PROVIDE A LEGAL SERVICE UNTIL THE EXPIRATION OF 21 DAYS AFTER THE DATE THE SUMMONS IS ISSUED.

(2) A PERSON WHO KNOWINGLY VIOLATES THIS SECTION IS GUILTY OF A MISDEMEANOR PUNISHABLE AS FOLLOWS:

(A) FOR A FIRST VIOLATION, A MISDEMEANOR PUNISHABLE BY A FINE OF NOT MORE THAN $1,000.00.

SENATE BILL No. 351

(B) FOR A SECOND OR SUBSEQUENT VIOLATION, A MISDEMEANOR PUNISHABLE BY IMPRISONMENT FOR NOT MORE THAN 1 YEAR OR A FINE OF NOT MORE THAN $5,000.00, OR BOTH.

Enacting section 1. This amendatory act takes effect 90 days after the date it is enacted into law.

SUBSTITUTE FOR

SENATE BILL NO. 981

(As amended September 30, 2014)

A bill to amend 1961 PA 236, entitled

"Revised judicature act of 1961,"

(MCL 600.101 to 600.9947) by adding section 914.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

SEC. 914. (1) A PERSON SHALL NOT INTENTIONALLY CONTACT AN INDIVIDUAL THAT THE PERSON KNOWS TO BE A PARTY TO A DIVORCE ACTION FILED WITH A COURT, OR AN IMMEDIATE FAMILY MEMBER OF THAT INDIVIDUAL, WITH A DIRECT SOLICITATION TO PROVIDE A LEGAL SERVICE UNTIL THE EXPIRATION OF 14 DAYS AFTER THE DATE THE PROOF OF SERVICE WAS FILED WITH THE COURT.

(2) A PERSON WHO KNOWINGLY VIOLATES THIS SECTION IS GUILTY OF A MISDEMEANOR PUNISHABLE AS FOLLOWS:

(A) FOR A FIRST VIOLATION, A MISDEMEANOR PUNISHABLE BY A FINE OF NOT MORE THAN <<$1,000.00>>.

(B) FOR A SECOND OR SUBSEQUENT VIOLATION, A MISDEMEANOR PUNISHABLE BY IMPRISONMENT FOR NOT MORE THAN 1 YEAR OR A FINE OF NOT MORE THAN <<$5,000.00>>, OR BOTH.

Enacting section 1. This amendatory act takes effect 90 days after the date it is enacted into law.